STATE OF ALASKA

IBLA 85-898, 85-899 Decided May 11, 1987

Appeal from decisions of the Fairbanks District Office, Bureau of Land Management, waiving administration of rights-of-way on lands conveyed to Native corporations. F-33008 and F-19177.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the underlying land has been conveyed to a Native corporation, 43 CFR 2650.4-3 requires that BLM waive administration of a right-of-way pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), absent a finding that retention would be in the interest of the United States.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed from two decisions of the Fairbanks District Office, Bureau of Land Management (BLM), dated July 25 and 29, 1985. These decisions waived BLM administration of rights-of-way F-19177 (IBLA 85-899) and F-33008 (IBLA 85-898), respectively, but recognized the reservation of the rights of the State as grantee pursuant to section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(g) (1982). The two waiver decisions issued after BLM had conveyed the underlying land to Native corporations.

On July 31, 1964, BLM granted materials site right-of-way F-33008 to the State of Alaska. On November 17, 1972, highway right-of-way F-19177 was granted by BLM to the State of Alaska. Both grants were made pursuant

to the Federal Aid Highway Act, as amended, 23 U.S.C. § 317 (1982). Neither right-of-way grant document specified an expiration date for the grant. On October 23, 1981, and September 22, 1983, BLM issued interim conveyances to AHTNA, Inc., and Sitnasuak Native Corporation, respectively. The conveyances were specifically subject to rights-of-way F-33008 and F-19177. In July 1985, BLM issued the decisions under appeal.

In both waiver decisions, BLM specified that, as grantee in the right-of-way grants, the State of Alaska "is entitled to all the rights, privileges and benefits granted by the terms of the grant, during the term of the grant, until it expires, is relinquished, or is modified by the mutual consent of" the Native corporations and the State. The Native corporations were "entitled to any and all interests previously held by the United States as grantor, in any such right-of-way covering the land conveyed." All rental and other fees would be paid to the Native corporations.

On appeal Alaska contends that the BLM waiver of administration would deny it, as grantee, the complete enjoyment of these rights-of-way, including the right of administrative appeal and the potential for Federal Highway Administration grants and aid. The State raises the possibility of termination of rights-of-way, and claims BLM failed to gain prior administrative waiver from the Federal Highway Administration. The State adds that proposed changes in the applicable regulation would clarify the rules to which these sites are subject, and BLM should have postponed its decisions until the regulatory changes issued. The State also contends that 43 CFR 2650.4-3, relied upon by BLM, so far exceeds the Department's statutory authority that the regulation itself should be declared invalid.

BLM responded that the Board should affirm BLM as it did in State of Alaska, 86 IBLA 268 (1985).

[1] As this Board stated in State of Alaska, 86 IBLA at 271, the statute and the regulation provide express authority for BLM to waive its administration of rights-of-way in lands conveyed to Native corporations. The effect of such a waiver is to transfer the administrative function to the Native corporation to which the land had been conveyed. Section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), states:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and became entitled to

> any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration.

The implementing regulation, 43 CFR 2650.4-3, elaborates:

> Leases, contracts, permits, rights-of-way, or easements granted prior to the issuance of any conveyance under this authority shall continue to be administered by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way, or easement, unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. [Emphasis added.]

Section 14(g) of ANCSA does not require waiver of administration, but grants discretionary authority to do so. By promulgating 43 CFR 2650.4-3, the Secretary exercised his discretionary authority under section 14(g) of ANCSA. Generally, when a conveyance includes all the land underlying a right-of-way, the Secretary has concluded it to be in the interest of the United States to waive administration. This Board has found this policy determination to be well supported. State of Alaska, 86 IBLA at 274. The exception arises only when the Secretary makes a contrary finding. It is not necessary to make a finding that the interest of the United States does not require continuation of the administration by the United States whenever a waiver of administration occurs. This finding is necessary only if some interest of the United States requires it to retain administration. 43 CFR 2650.4-3. A finding that no exceptional circumstances exist is implicit in every waiver. The rights-of-way at issue were entirely included in conveyances to Native corporations. There have been no contrary findings. Absent a finding by the Secretary that retention of administration was in "the interest of the United States" (not the State), BLM was obliged by the regulation to waive.

Appellant suggests 43 CFR 2650.4-3 is ultra vires and should not be followed. Both the Board and BLM are bound to follow a duly promulgated regulation of the Department. McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955); AHTNA, Inc., 87 IBLA 283, 291 (1985), and cases cited. We find the regulation to be consonant with the statute, as the regulation

43 CFR 2650.4-3 is itself an exercise of the discretionary authority the statute granted to the Secretary. See generally State of Alaska, supra.

The State claims it will lose "complete enjoyment" of the rights-of-way, particularly the procedural safeguards of its administrative appeal rights under 43 CFR Part 4. However, no right to Departmental adjudication was granted in the right-of-way grants or in the interim conveyances. Notwithstanding the loss of administrative appeal and hearing rights, the State will continue to have recourse to the courts in order to safeguard those rights which were reserved. See, e.g., Tetlin Native Corp. v. State of Alaska, No. 4 FA-84-2536 Civil (Alaska Aug. 12, 1985). Waiver of administration would not diminish the State's ability to take action. 1/ However, it would shift the forum for resolution of the propriety of action taken in the administration of the right-of-way from Federal to State court and bypass the intermediate step of administrative adjudication by the Department. Appellant has not shown that its interests would be given less due process protection as a result of waiver of this Department's administrative authority. See Tetlin Native Corp. v. State of Alaska, supra at 4. As we said in State of Alaska, 86 IBLA at 272, the State

> still enjoys the same right to use the same land in the same manner under the same terms and conditions as before. The fact that the State may prefer one administrator over another, or one administrator to several, does not bear on its rights to "complete enjoyment of its interest in the land." "Enjoyment" in this context does not mandate a right to happiness, contentment, or freedom from apprehension. Rather, it refers to the exercise of a right; the possession and fruition of a right, privilege, or use.

Any party having authority to administer the grant must comport with the terms and conditions of the right-of-way grant. The conveyances were expressly made subject to the rights-of-way, and under section 14(g) of ANSCA, the Native corporations assume the role of the grantor with all attendant rights under the right-of-way, including the right to cancel, 2/ to approve sublessees, to receive rent, and to inspect. Those rights and obligations belong to the grantor, who retains the ultimate authority to take appropriate action under the right-of-way grant. See 23 U.S.C. § 317 (1982). Absent a clear indication of statutory intent, we will not interpret section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), to limit the grantor's interests. The waiver of administration does not affect those rights of the grantor guaranteed by section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), and the grantee remains subject to them.

Appellant also contends that a waiver of BLM administration would limit its access to potential grants and aid from the Federal Highway Administration.

1/ In addition, the State is now able to choose to resort to condemnation. 2/ See Tetlin Native Corp. v. State of Alaska, supra at 3.

Appellant claims BLM should have consulted the Federal Highway Administration to determine whether a United States interest would be adversely affected by waiver. The Federal Highway Administration was not the agency responsible for administration of the right-of-way prior to the waiver, and BLM has not sought to impair the statutory authority of the Federal Highway Administration.

There is no evidence that the applicable regulation was not duly promulgated and both the State and the Federal Highway Administration are chargeable with constructive notice of the regulation. Neither the State nor the Federal Highway Administration was required to receive additional notice that BLM intended to implement the regulation. 3/ In light of the mandatory tenor of the regulation, only BLM's refusal to waive with no basis for retention of administrative responsibilities would constitute arbitrary and capricious conduct. State of Alaska, 86 IBLA at 272-73.

Review of the record and the parties' arguments does not reveal a Federal interest which requires continued administration of these two rights-of-way by the United States. We decline to overturn the BLM decision to waive administration of these rights-of-way. As said in State of Alaska, supra:

> Where the land is no longer owned by the United States and the United States has no residual interest or benefit deriving from the third-party leases, rights-of-way, permits, et cetera, which encumber those lands, it is difficult to justify continuing the Federal administration of those interests at taxpayers' expense, particularly where the new landowner (the corporation) is capable of assuming that function on its own behalf. Except in unusual circumstances, there is little or no reason for the United States to continue to maintain records, perform compliance inspections in the field, engage in correspondence with the interested parties, handle billings, collections, accounts and disbursements, and conduct adjudication. The fact is that these matters are no longer the proper responsibility of the Federal government, and that fact is not altered because the State finds the change inconvenient or otherwise undesirable.

86 IBLA at 274.

3/ The file does not indicate that the Federal Highway Administration had actual notice of the waivers. It would seem appropriate for the Secretary to inform concerned agencies when making such determinations. See State of Alaska Department of Highways, 20 IBLA 261, 270, 82 I.D. 242, 245 (1975). The case records contain evidence of past consultation, in the form of letters to BLM from the Federal Highway Administration and its predecessor, the Department of Commerce, Bureau of Public Roads.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Fairbanks District Office are affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge